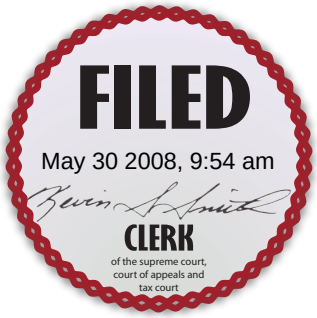


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# IN THE COURT OF APPEALS OF INDIANA

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|---|---|---|
| IN THE GUARDIANSHIP OF A.N.B. and J.N.B., | ) | |
| | ) | |
| WILLIAM BAKER, | ) | |
| | ) | |
| Appellant-Respondent, | ) | |
| | ) | |
| vs. | ) | No. 71A05-0710-CV-593 |
| | ) | |
| CHRISTINE LEIGH BAKER n/k/a CHRISTINE LEIGH WEITZENFELD, | ) | |
| | ) | |
| Appellee-Petitioner. | ) | |

APPEAL FROM THE ST. JOSEPH PROBATE COURT
The Honorable Peter J. Nemeth, Judge
Cause No. 71J01-0703-GU-43

**May 30, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## STATEMENT OF THE CASE

William Baker ("Father") appeals from an order granting guardianship of Father's children, A.B. and J.B. (collectively "the children"), to Mark Weitzenfeld ("Stepfather") and Claudia St. Germain ("Grandmother"). Father presents a single issue for review, namely, whether the evidence is sufficient to support the guardianship order.

We affirm.

## FACTS AND PROCEDURAL HISTORY

Father and Christine Leigh Baker ("Mother") were married in April 1997. Two children were born during the marriage: a daughter, A.B., born August 8, 1997, and a son, J.B., born July 23, 1999. Father and Mother separated in December 2001, at least in part because Father had determined that he was homosexual, and they were divorced in February 2002. As of the month of the divorce, Father had begun a relationship with nineteen-year-old Omar Ceballos, and Ceballos had moved in with Father. Mother and the children were living in the former marital residence.

A short time later, Mother and the children moved to an apartment, and Father and Ceballos moved into the former marital residence. Under the divorce decree, Father was to pay the first and second mortgage on the former marital residence in lieu of child support. However, Father failed to do so, and the home was ultimately taken in foreclosure proceedings.

Beginning in 2002, Father sporadically exercised visitation. Around the middle of 2002, Father began to exercise visitation more consistently, having the children from Saturday morning to Sunday evening every other week. Stepfather or Mother usually

provided transportation for the visitations. A few times over five years, Father watched the children for Stepfather and Mother for a day outside of the regular visitation schedule.

In January 2002, Mother began a relationship with Stepfather. A short time later, Stepfather began spending time with Mother and the children as a family unit. At that time, A.B. was four years old and J.B. was two years old. By January 2003, Mother and Stepfather had become engaged, and Stepfather had moved in with Mother and the children. From that time forward, Stepfather helped provide day-to-day care for the children.

Mother was diagnosed with breast cancer in 2003. At times when Mother was unable to care for the children because of her illness, Stepfather and Grandmother, who is Mother's mother, cared for them. In December 2006, Mother executed a will that was prepared by an attorney. In the will, Mother stated her desire that Grandmother and Stepfather be co-guardians of the children and her belief that Father would not be a suitable guardian.

Mother succumbed to cancer on March 23, 2007. Since her death, Stepfather and Grandmother have shared the responsibility of taking care of the children. Stepfather is a professional earning over $50,000 annually, and Grandmother is a professional earning over $60,000 annually. Presently, Stepfather and the children live in the home that he and the children shared with Mother. The children attend school in the Mishawaka school district, and Grandmother has plans to build a home in the same school district. At their school, the children attend after-school care during the school year and participate in full-time daycare during summer break. The children are also involved in swimming and tennis lessons, and A.B. meets twice weekly with a tutor.

Grandmother assists daily with the children, including preparing meals and getting the children bathed, filling a motherly role. Stepfather also provides such care for the children and fills a fatherly role. As when Mother was living, the children attend church on weekends that they are not with Father, and Stepfather and Grandmother also lead the children in daily devotionals.

On March 19, 2007,[1] shortly before her death, Mother filed a petition for appointment of guardianship, asking that Stepfather be appointed guardian over the children.[2] On March 29, 2007, Father filed his motion contesting the petition,[3] and on May 1, 2007, Grandmother filed her motion to intervene and for custody. The trial court granted Grandmother's unopposed motion to intervene. On July 6, 2007, the court held a hearing on the petition for guardianship. The trial court took the matter under advisement.

On September 28, 2007, the court entered its Findings of Fact and Conclusions of Law ("Guardianship Order"). In the Guardianship Order, the court awarded co-guardianship of the children to Stepfather and Grandmother. The order, which contains special findings and conclusions, provides in relevant part:

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[1] The Chronological Case Summary ("CCS") entry for the petition is dated March 20, 2007, but the signature date on the petition is March 19, 2007. The parties have not provided a file-stamped copy of the petition, so we assume that the filing date is the signature date. The parties have not provided copies of any other pleadings filed in this proceeding, so we refer to the CCS entry date for subsequent pleadings.

[2] The trial court also observed that Mother instituted proceedings to collect child support. However, "[t]he effort to obtain child support from Father ended when Mother died." Appellant's App. at 8. The record before us does not indicate why that effort "ended," but we observe that child support is the right of the child, not the custodial parent. See Straub v. B.M.T., 645 N.E.2d 597, 599 (Ind. 1994).

[3] Father has not included a copy of any pleadings in the appendix. A copy of Mother's petition to appoint a guardian is before us as one of the exhibits that was admitted at the guardianship hearing.

3. In November-December 2001, Mother and Father separated because Father wished to pursue a homosexual relationship with Omar Ceballos ("Omar").

* * *

10. Stepfather lived with Mother and the two Children since January, 2002.

* * *

26. Grandmother became the primary caregiver for the children in the Summer of 2006 due to [M]other's terminal illness. Grandmother's time with the children increased as Stepfather spent more time in helping Mother with her various cancer treatments. Since the death of Mother, a routine has been established whereby Grandmother and Stepfather are joint caregivers for the Children.

* * *

CONCLUSIONS OF LAW

1. Grandmother and Stepfather have been involved in the day-to-day care of the children for over four years. [F]ather has not been involved in the day-to-day care of the children for almost six years. Father left his wife and children to pursue his homosexual relationship with Omar Ceballos and acquiesced in the caregiving to the children provided by [G]randmother and [S]tepfather for the past several years.

2. Father acquiesced in the care of the children by Grandmother and Stepfather.

3. The financial position and the ability of Grandmother and Stepfather to take care of the children [are] superior to that of Father.

4. A strong emotional bond has formed between the children and their Stepfather and Grandmother and it would be in the best interest of the children to maintain this relationship and this caregiving situation.

Appellant's App. at 7, 9. Father now appeals.

## DISCUSSION AND DECISION

Child custody determinations are within the discretion of the trial court and will not be disturbed except for an abuse of discretion. Truelove v. Truelove, 855 N.E.2d 311, 314 (Ind. Ct. App. 2006) (citation omitted). We will not reverse unless the trial court's decision is against the logic and effect of the facts and circumstances before it or the reasonable inferences drawn therefrom. Id.

> [A]n appellate court may not impose its own view as to whether the evidence is clear and convincing but must determine, by considering only the probative evidence and reasonable inferences supporting the judgment and without weighing evidence or assessing witness credibility, whether a reasonable trier of fact could conclude that the judgment was established by clear and convincing evidence.

In re Guardianship of B.H., 770 N.E.2d 283, 288 (Ind. 2002). A trial court is required to enter findings when it determines that placement with someone other than a natural parent is in the child's best interest. Hinkley v. Chapman, 817 N.E.2d 1288, 1293 (Ind. Ct. App. 2004) (citing In re B.H., 770 N.E.2d at 287). Thus, we will reverse the trial court's judgment when there is no evidence to support the findings or the findings do not support the judgment. Id.

Here, the trial court's order awarded guardianship to persons other than the children's natural parent, Father. There is a strong presumption in all cases that a child's best interests are ordinarily served by placement in the custody of a natural parent. In re B.H., 770 N.E.2d at 287. This presumption is the logical starting point for a court's analysis in any proceeding relating to custody.

The second step of the court's analysis is to determine whether a third party, other than the natural parent, has rebutted this presumption. This presumption may not be

overcome merely because a third person could provide "the better things in life" for the child. Id. (citation omitted). In fact, our supreme court has rejected the notion that a trial court may place a child with a third party by solely considering the "best interests" of the child. Id. Instead, before placing a child in the custody of a person other than the natural parent, the third party must rebut the presumption by clear and convincing evidence. Evidence sufficient to rebut the presumption may consist of, but need not necessarily be limited to, the natural parent's unfitness, the natural parent's acquiescence to the guardianship, or demonstrating that a strong emotional bond has formed between the child and the third person. Id.

Only once this presumption is rebutted does the trial court engage in a general best interests analysis. This best interests test is a "separate analysis in custody proceedings involving a third party that is reached only after the presumption in favor of the parent has been rebutted." In re Guardianship of L.L., 745 N.E.2d 222, 230 (Ind. Ct. App. 2001), trans. denied (emphasis added). In this analysis, the trial court determines whether it is in the best interests of the child to be placed in the custody of the third party. Id.

Father argues that trial court made "several inaccurate findings when it made its decision to grant the guardianship in this case." Appellant's Brief at 11. Specifically, he contests the trial court's findings that Stepfather has lived with the children since 2002, that Father acquiesced to Stepfather's and Grandmother's caretaking of the children, and that Father had left Mother and the children to have a homosexual relationship. Father also disputes the trial court's conclusion that Stepfather was involved in the day-to-day care of the children for six years. And he argues that the trial court abused its discretion by assigning an inappropriate amount of weight to the respective financial conditions of

the guardians and Father and by its consideration of the close attachment that Stepfather and Grandmother share with the children. We address each contention in turn.

Father first challenges the trial court's finding that Stepfather had been involved in the children's lives since January 2002. In particular, Father correctly points out that Stepfather did not move in with Mother and the children until January 2003. Thus, Father contends, Stepfather could not have been involved in the day-to-day care of the children for "almost six years." Appellant's Brief at 12.

Father is correct. The evidence shows that Stepfather first became involved in the children's lives in January 2002 and that he moved in with Mother and the children in January 2003. Thus, the trial court's finding that Stepfather lived with Mother and the children since January 2002 is erroneous. But the Guardianship Order also includes the trial court's conclusion that Stepfather had been "involved in the day-to-day care of the children for over four years." Appellant's App. at 7. Although listed as a conclusion, that determination is actually a finding of fact. As shown above, the evidence supports that finding. Thus, the trial court's error in finding that Stepfather lived with the children since January 2002 is harmless.

Father next challenges the trial court's finding that he acquiesced to Stepfather and Grandmother providing care for the children. Specifically, he argues that the finding of acquiescence is erroneous because there is undisputed evidence that he timely contested the guardianship proceeding. And he justifies his failure to contest the custody arrangements out of concern for Mother, who, he acknowledges, drew strength from the children during her extended terminal illness.

But Father confuses a challenge of formal custody arrangements with involvement in the children's lives through the exercise of parenting time. Father need not have challenged the custody arrangement to avoid acquiescing in the children's care arrangements. The trial court found that Father has exercised visitation on a "fairly regular basis" every other weekend for one night since sometime in the middle of 2002.[4] Id. at 8. And Father does not contest the findings that he has not paid child support and that, "[t]hroughout the period after the divorce, Father failed to pay any school fees, supplies, clothes [sic] or otherwise [sic] and failed to pay any court[-]ordered medical bills pursuant to the Divorce Decree." Id. Thus, we cannot say that the evidence does not support the trial court's finding of acquiescence.

Father also contests the trial court's finding that, "[i]n November-December 2001, Mother and Father separated because Father wished to pursue a homosexual relationship with Omar Ceballos ("Omar")." Id. at 7. In support, Father points to his testimony that he and Mother both knew "that their relationship was not going to work and that is why the two separated." Appellant's Brief at 12. But Father provides neither further argument on this issue nor citations to supporting authority. As a result, he has waived the argument. See Ind. Appellate Rule 46(A)(8)(a). And waiver notwithstanding, Father's argument must fail. Father testified that one of the reasons he left Mother and the children was because he is homosexual. To the extent that Father argues another

[4] Father avers that he had the children additional times, such as for a one-week camping trip. But the trial court made no findings about any additional parenting time exercised by Father. And, even assuming the exercise of visitation during a weeklong camping trip and a few additional visitation times outside of the scheduled overnight every two weeks, Father has not shown that he asserted himself to be more than incidentally involved in parenting the children.

reason caused the break-up, such is essentially a request for us to reweigh the evidence, which we cannot do. See In re B.H., 770 N.E.2d at 288.

Father next challenges the trial court's findings regarding the respective financial conditions of Father, Stepfather, and Grandmother. In particular, Father maintains that the trial court "incorrectly indicated that presently [Father] relied upon Ceballos for assistance in his financial matters." Appellant's Brief at 14. We cannot agree. The trial court found that "Father makes over Thirty[-]Five Thousand Dollars ($35,000.00) per year at a new job with Sam's Club and is partially supported by his partner, [Ceballos]." Appellant's App. at 9. Father testified that Ceballos' $18,000 annual salary helps with the bills. Thus, the evidence supports the trial court's finding.

Father also asserts that the trial court assigned inappropriate weight to the Stepfather's and Grandmother's financial positions as compared to Father's. We agree with Father that the presumption favoring a natural parent over a proposed guardian will not be overcome "merely because a third party can provide better things in life for the child." Id. at 15 (citing In re B.H., 770 N.E.2d at 287) (emphasis added). But the trial court did not rely solely on the financial conditions of Father, Stepfather, and Grandmother when it decided to award guardianship to Stepfather and Grandmother.

The Guardianship Order was based partly on the findings that Father has not paid child support since the divorce and that he has only briefly and rarely exercised visitation for longer than a single overnight every two weeks. As discussed further below, the children are attached to Stepfather and Grandmother, who have provided the children's day-to-day care for over four years. Thus, the respective financial conditions of Father, Stepfather, and Grandmother constitute additional, but not the only, evidence relied upon

by the court in awarding guardianship. Financial evidence shows, in part, that Father maintains a four-bedroom home with the help of Ceballos' income and that Father has not even attempted to estimate the cost of having two additional members of the household full-time. In light of all the evidence, we cannot say that the trial court erroneously assigned inappropriate weight to the financial conditions of Father and the co-guardians.

Lastly, Father challenges the trial court's consideration of the emotional bonds that Stepfather and Grandmother share with the children. After acknowledging the existence of those attachments, Father argues that "the appropriate question is whether or not the presumption favoring the natural parent has been overcome in this case by clear and cogent evidence." Appellant's Brief at 15. But, again, the trial court did not rely on a single factor when determining whether to award guardianship.

As demonstrated above, the trial court found that Stepfather and Grandmother had provided day-to-day care of the children for several years, both during Mother's illness and since her death. Mother instituted the guardianship proceeding shortly before her death, asking that Stepfather be named the children's guardian. The children, Stepfather, and Grandmother are emotionally bonded, and the children have continued to attend the same school and to maintain the routines they had when Mother was alive.

And, again, the court found that Father had not provided day-to-day care for the children since he and Mother separated in 2001, that he had exercised visitation on a regular basis only for a single overnight every other week, and that he had acquiesced in Stepfather and Grandmother providing the day-to-day care. Additionally, Father does not contest the trial court's findings that he has not paid child support or costs associated with

the children. Father resides with his partner, Ceballos, in a four-bedroom house in a different school district from where the children currently live. He testified that he intended to change the children's school enrollment and activities once they came to live with him. During the hearing, he expressed no concern about the effect of such changes on the children, even considering such changes could take place so close to Mother's death. Again, Father's finances are partially supported by Ceballos' income, and Father has not considered what costs would be associated with adding two members to his household. And Father has made no inquiries into Ceballos' immigration status.

The overwhelming evidence of Stepfather's and Grandmother's consistent and attentive care for the children, Father's acquiescence in that arrangement, Father's failure to consistently exercise more than minimal visitation, his failure to provide financial support, and the emotional bond between the children and the guardians provide clear and convincing evidence rebutting the presumption that the children's best interests are served by placement with Father, the natural parent. Thus, the evidence supports the trial court's determination that the children's best interests are served by awarding guardianship to Stepfather and Grandmother. Father's arguments on appeal to the contrary are without merit.[5]

Affirmed.

DARDEN, J., and BROWN, J., concur.

[5] Still, Father argues that the trial court's order is erroneous in light of other factors, such as his support of the children's continuing relationship with Grandmother and the lack of any evidence that contact with Ceballos' sisters is harmful to the children. But Father's argument amounts to a request that we reweigh the evidence, which we cannot do. See In re B.H., 770 N.E.2d at 288. Thus, we conclude that the trial court did not err when it awarded guardianship of the children to Stepfather and Grandmother.